Canada's foreign investors face new scrutiny

Craig Brown explains implications of recent amendments to Canadian investment and competition laws which could allow the government to block foreign investments to the mining sector

THE HEALTH AND vibrancy of the Canadian mining industry is to a significant extent contingent on foreign direct investment and the active engagement of foreign industry participants. The amendments to the *Investment Canada Act* (ICA) and the *Competition Act*, that came into force on 12 March 2009, have important implications for Canadian and foreign mining industry participants and the legal professionals that advise them.

The amendments reflect two important, but somewhat conflicting, federal policy initiatives.

Firstly, the amendments attempt to provide notice to the world that Canada will not resort to protectionist policies in an effort to mitigate the impact of the current international economic slowdown. This position is reflected in the amendments which substantially reduce the scope of intervention by the government in connection with foreign investment.

Somewhat in opposition to this policy position, however, is the introduction of a new review process under the ICA which allows the government to block foreign investments that could be injurious to Canada's national security.

Particular implications

Deal size trigger for review dramatically increased

Major foreign players in the mining industry will be encouraged by the amendments that are designed to reduce the number of foreign investments that are subject to review under the ICA. The bright-line threshold for review for direct acquisitions of Canadian businesses (other than acquisitions of cultural businesses) by foreign investors has been increased from C$312m. ($287.2m. - based on book value) to C$600m. ($552.4m. - based on *enterprise value*).

This new threshold amount will increase over a five-year period to $1,000m., adjusted according to inflation thereafter. No definition of 'enterprise value' was included with the amendments, but is anticipated to be prescribed by subsequent regulation. The lower review thresholds that previously existed for Canadian businesses engaged in transportation services (including pipelines) or uranium production have been eliminated and such businesses are now subject to the same higher threshold of C$600m. ($552.4m.).

New national security test

While the higher review threshold clearly encourages foreign investment in Canada, potential investors may be troubled by the new review process for investments that could be injurious to *national security*. Until such time as a definition of national security is provided, the applicable vague test "could be injurious to national security", is ambiguous and arguably gives the ministry of industry and the federal cabinet wide discretion to decide which transactions they will review.

This new review process test applies regardless of the size or

the sector in which the foreign investment is proposed and is, accordingly, an important consideration for industry participants of all sizes.

Concerns about the discretionary nature of these new national security review provisions may be heightened in light of the recent experience with similar national security review provisions in Australia. Relying on equally ambiguous language in Australia's *Foreign Acquisitions and Takeovers Act* (1975), the Australian government shut down a $1,800m. offer by China Minmetals Group to acquire control of Oz Minerals Ltd.

Although Oz Minerals' operations are not sensitive from a national security perspective, one of its properties in Australia is located in close proximity to a high security weapons testing facility operated by the Australian Armed Forces. The decision by the Australian government illustrates the broad discretion such ambiguous language affords. It is too early to know if the ministry of industry and the federal cabinet will exercise their discretion so widely but it will undoubtedly be an issue of concern for foreign investors.

New onus of proof for culpability under competition act

Amendments to the Competition *Act* are no less significant. The amendments represent a departure from the criminal conspiracy section of the Competition *Act* by eliminating the requirement to show that an agreement among competitors will lessen or prevent competition unduly.

Under the new legislation, such agreements are *per se* illegal where competitors agree, conspire or arrange among themselves to fix, maintain, increase or control prices or fix, maintain, control, prevent, lessen or eliminate supply of a product or allocate sales, territories, customers or markets for the production or supply of a product. Competitors responsible for any of such actions are guilty of a criminal offence with penalties that have increased to a new maximum of $25m. for each count and up to 14 years of imprisonment.

New dominance abuse provisions with serious penalties

Major mining industry participants will have to pay careful attention to new abuse of dominance provisions. Administrative monetary penalties of up to $10m. for a first order and up to $15m. for subsequent orders have been introduced as significant additional disincentives to anti-competitive conduct by dominant firms that substantially lessen or prevent competition. Given the significance of such potential penalties, industry majors will need to more critically assess how their aggressive business practices may be impacting the markets in which they are active.

New information request powers could cause delays

Consistent with the amendments to the review thresholds under the ICA, amendments to the *Competition Act* increase the thresholds for mandatory pre-merger notification to $70m. from the previous $50m. level and will be revised annually based on chances in national GDP.

Replacing the previous 14 and 42-day waiting periods for short form and long form notifications is a 'second request' type of process for merger notification and review, whereby an initial 30-day waiting period applies that can be extended by the commissioner of competition requiring the production of additional information.

The second request for information could be far reaching and consequently materially impact compliance costs and delay the closing of proposed transactions. To encourage compliance with the pre-merger notification regime, the amendments to the *Competition Act* introduce a mechanism for the imposition of significant administrative monetary penalties of up to $10,000/day for non compliance.

Conclusion and recommendations

Many of the amendments discussed above will need to be clarified by new regulations and guidelines explaining how they will be administered and enforced. Until such guidance is available, we are recommending the following:

1. Businesses with market power in one or more markets should review and appropriately revise their trade practices in light of the significant potential administrative monetary penalties that have been introduced for anti-competitive acts that substantially lessen or prevent competition.
2. All ongoing collaborations with competitors should be re-examined to ensure they do not offend the new *per se* offence for agreements between competitors to fix prices, allocate markets or customers, or fix output or supply.
3. Businesses should review and appropriately revise their competition law compliance programmes in light of the amendments to ensure they avoid behaviour that may violate the Competition Act and to ensure they are not unnecessarily imposing restrictions on their sales forces that are no longer legally mandated.
4. Businesses should be mindful of the transaction size thresholds for merger notification under the Competition Act is now $70m. (up from $50m.) in assets or gross revenues.
5. Foreign investors considering investments in Canada need to be aware of the increase in the review threshold under the ICA to $600m. based on 'enterprise value' up from $312m. based on the book value of assets. Uranium mining and pipeline industry participants should consider taking advantage of the fact that there will no longer be lower review thresholds for businesses in such industries.
6. Businesses must be mindful that the amended ICA now incorporates a basis for reviewing investments on the grounds of national security and such power has a retroactive effect as of 6 February 2009. The ambiguity relating to the new national security review creates new timing and execution risks that will have to be assessed by businesses and their legal advisors.

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